Supreme Court, U.S.
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No. 02-1237

IN THE

Supreme Court of the United States

WILLIAM H. PRYOR, JR., *et al.*,

Petitioners,

v.

DANNY JOE BRADLEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Following unsuccessful pursuit of state and federal post-conviction relief from his conviction and death sentence for the first-degree sexual assault/murder of his stepdaughter, Rhonda Hardin, respondent Danny Joe Bradley commenced a federal civil rights action, pursuant to 42 U.S.C. § 1983, seeking to compel petitioners' production of certain items of key physical and biological evidence, in order to allow for the conducting of DNA testing. The federal district court dismissed respondent's action for lack of subject-matter jurisdiction, holding that respondent's Section 1983 claim is the "functional equivalent" of an impermissible repetitive petition for habeas corpus, because in seeking to compel production of evidence for purposes of potentially-exculpatory DNA testing, respondent was directly or by necessary implication attacking the validity of his underlying conviction and sentence. A unanimous panel of the Eleventh Circuit Court of Appeals reversed, holding that under this Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), respondent's Section 1983 claim is clearly not the "functional equivalent" of a habeas claim. Although the Court of Appeals required post-argument supplemental briefing on the question of whether respondent's Section 1983 claim was premised upon a cognizable procedural or substantive due process right of post-conviction access to potentially-exculpatory evidence, the Court ultimately declined to address or decide that issue.

The question presented is:

Whether a "compelling reason" exists for this Court to review the decision below, where no genuine and meaningful conflict exists between that decision and the other federal appellate decisions invoked by petitioners, and where the important federal constitutional question underlying respondent's Section 1983 claim was not decided by either of the courts below?

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Respondent Danny Joe Bradley hereby requests that this Court deny the Petition for Writ of Certiorari ("Pet.") filed by petitioners William H. Pryor, *etc.*, *et al.*, seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit entered in this case on September 23, 2002.

COUNTERSTATEMENT OF THE CASE

The facts regarding respondent Bradley's underlying conviction and death sentence, as found by the courts of the State of Alabama and the federal courts in prior proceedings, have been set forth on numerous occasions and need not be revisited here, as they have no particular bearing on this Court's assessment of whether or not the Petition should be granted.[1] Accordingly, respondent addresses here only those limited points set forth in petitioners' factual recitation as to which respondent believes that petitioners' portrayal is inaccurate and therefore misleading, or incomplete.

Petitioners go to great lengths to recount the course of dealings between the State and various counsel acting on behalf of respondent Bradley, starting in 1996, to secure production by the State, on a cooperative basis, of critical items of physical and biological evidence utilized by the State in obtaining respondent Bradley's murder conviction, to allow that evidence to be subjected to DNA testing. Pet. at 9-11. Petitioners clearly imply that respondent's failure to

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1. *See generally Bradley v. State*, 494 So. 2d 750 (Ala. Ct. Crim. App. 1985), *aff'd sub nom. Ex Parte Bradley*, 494 So. 2d 772 (Ala. 1986) (*per curiam*), *cert. denied sub nom. Williams v. Ohio*, 480 U.S. 923 (1987); *Bradley v. Nagle, etc., et al.*, Case No. 93-B-0958-S, Mem. Opinion and Order (N.D. Ala. January 27, 1999), *aff'd*, 212 F.3d 559 (11th Cir. 2000), *cert. denied*, 531 U.S. 1128 (2001).

commence this Section 1983 action until June 2001 supports the conclusion that respondent "sat on his rights" and/or engaged in improper strategic delay in pursuing relief. *Id.* at 14. Petitioners' recitation in this regard is incomplete in content and misleading in substance.

As a factual matter, petitioners fail to acknowledge that, notwithstanding the duration of the efforts by respondent Bradley's representatives to persuade the State to comply with their repeated requests for the production of the subject evidence, as late as September 26, 2000, the Assistant Attorney General acting as the State's lead counsel in this case wrote to respondent's counsel, stating, *inter alia*, that "[a]s soon as possible, I will inform you in writing of the items *that will be made available for DNA testing*." Indeed, not until March of 2001 — after this Court denied certiorari in respondent's federal habeas corpus proceeding — did the State categorically take the position that it would not cooperate with respondent's requests for the production of evidence for testing on a consensual basis. As a legal matter, Petitioners fail to inform this Court that both before the district court and in the Court of Appeals in the proceedings below, they argued that respondent's action should be rejected on the grounds that it was commenced in an untimely manner. The district court expressly declined to rule on petitioners' statute of limitations argument (*see* Pet. Appendix ("App.") at 36 n.20), and the Court of Appeals, *sub silentio*, rejected it. Accordingly, the timing of respondent's filing of this action has no bearing on the issue with respect to which review by this Court is sought by petitioners, and their effort to imply otherwise should be disregarded.

Similarly, this Court should not be distracted by petitioners' discussion of the results yielded by limited DNA

testing that has been completed with respect to certain bedding that was collected from respondent's household during the murder investigation and that was introduced into evidence at trial. Pet. at 12. While fecal/semen stains on that bedding were found by both the State's and respondent's forensic experts to be consistent with the genetic markings of respondent and the victim, respectively, the same test results also identified additional male and female DNA belonging to individuals whose identities are unknown. Moreover, it can hardly be the subject of any good-faith dispute that the items of physical and biological evidence that respondent Bradley seeks to obtain through this action — *i.e.*, the semen-stained clothing in which his stepdaughter's corpse was found and the "rape-kit" swabs and slides prepared by the State's forensic pathologist at the time of autopsy — are, if located, produced, and tested, far more likely to yield findings definitive as to respondent's involvement or non-involvement in the sexual assault of the victim than a blanket containing stains of wholly uncertain and possibly disparate vintage. For these reasons, petitioners' contention that "DNA testing already performed has corroborated [respondent's] guilt" (Pet. at 14) is, at best, an overstatement, and likewise should carry no weight in this Court's assessment of the Petition.

REASONS FOR DENYING THE WRIT

I. NO GENUINE AND MEANINGFUL CONFLICT WORTHY OF THIS COURT'S REVIEW EXISTS BETWEEN THE DECISION BELOW AND THE FOURTH AND FIFTH CIRCUIT DECISIONS INVOKED BY PETITIONERS

Petitioners contend that in ruling below that respondent's post-conviction action under 42 U.S.C. § 1983 seeking to compel the State to produce pertinent evidence for purposes of conducting DNA testing is not the "functional equivalent" of a petition for writ of habeas corpus as contemplated by the analysis provided by this Court in *Heck v. Humphrey*, 512 U.S. 477 (1994), the Eleventh Circuit created a direct conflict with recent decisions of the Fourth and Fifth Circuits in *Harvey v. Horan*, 278 F.3d 370 (4th Cir.), *reh'g denied*, 285 F.3d 298 (4th Cir. 2002), and *Kutzner v. Montgomery County*, 303 F.3d 399 (5th Cir. 2002). Pet. at 13; *see id.* at 15. While petitioners' assertion may appear correct at a superficial level, close scrutiny of the decisions serving as the foundation of petitioners' classic "conflict in the circuits" rationale for the granting of review by this Court casts serious doubts on the merit of petitioners' premise.

In *Harvey v. Horan*, a Virginia state prisoner serving a lengthy sentence on the basis of a conviction for rape and forcible sodomy commenced a Section 1983 action in federal district court after the prosecutor declined his request to be provided with access to "rape kit" evidence in order to allow him to conduct DNA testing that he believed would produce results tending to exculpate him. In both a motion to dismiss, which was denied, 119 F. Supp. 2d 581 (E.D. Va. 2000), and a subsequent motion for summary judgment, the State

unsuccessfully argued that Harvey's complaint failed to state a claim upon which relief could be granted. The district court (Sen. Dist. Judge Albert V. Bryan, Jr.) rejected the State's argument, holding that "pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), the plaintiff has a due process right of access to the DNA evidence and to conduct DNA testing upon the biological evidence, as such evidence could constitute material exculpatory evidence." *Harvey v. Horan*, Civ. Action No. 00-1123-A, 2001 WL 419142 (E.D. Va. April 16, 2001).

On appeal, the Fourth Circuit reversed, a panel led by Chief Judge Wilkinson concluding, *inter alia*, that under this Court's decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), the plaintiff's suit was the "functional equivalent" of a collateral attack on the validity of his conviction and/or sentence, cognizable only as a federal habeas corpus petition (which was procedurally barred). *See generally Harvey v. Horan*, 278 F.3d 370, 375, 378 (4th Cir. 2002). Although Circuit Judge King ultimately concurred in the panel's determination to dismiss plaintiff Harvey's Section 1983 action, he expressly disagreed with that portion of Chief Judge Wilkinson's opinion for the Court which addressed the "functional equivalency" analysis, as follows:

> In this proceeding, Harvey seeks access to the biological evidence held by the Commonwealth's Attorney, and his suit, if successful, would merely result in the Commonwealth's Attorney making the evidence available to him. That act alone — providing Harvey with access to the biological evidence relating to his rape conviction — does not, in the words of Justice Scalia, "necessarily imply" the invalidity of Harvey's conviction or sentence. [*Heck v. Humphrey*, 512 U.S.] at 487.

> *Although Harvey might use the evidence, at some future date, to initiate a separate action challenging his conviction, future exculpation is not a necessary implication of Harvey's claim in this case.* Indeed, Harvey's capable counsel acknowledged at oral argument that state-of-the-art DNA testing often inculpates rather than exculpates, and at other times it simply is inconclusive. Thus, it is also possible — and the Commonwealth would say likely — that such testing will provide more conclusive evidence of Harvey's guilt. Put simply, we do not know whether providing Harvey with access to the evidence would assist or hinder his attempts at exculpation; therefore, his civil action requesting access to the biological evidence does not "necessarily imply" the invalidity of his conviction.

278 F.3d at 382-83 (King, J., concurring in part and concurring in the result) (emphasis added). Thus, as regards the specific "functional equivalence" issue, arising under *Heck v. Humphrey*, that was presented in the *Harvey* case and is squarely presented here, only two of the three judges on the initial *Harvey* panel were of the view that a Section 1983 action of the type involved here is actually nothing more than a habeas action "in disguise".

During the pendency of the initial Fourth Circuit appeal in *Harvey*, the Virginia legislature enacted a statute — Va. Code §§ 19.2-327.7 *et seq.* — pursuant to which state prisoners were enabled to pursue post-conviction DNA testing of potentially-exculpatory evidence through proceedings in the state courts. *See generally Harvey*, 278

F.3d at 377, 380 n.3. Subsequent to the issuance of the panel decision denying relief under Section 1983, Harvey succeeded in obtaining an order from the state trial court ordering production by the prosecution of the same evidence he had sought to compel through his action in federal court, thus rendering his pending petition for rehearing in the federal appeal effectively moot. Although rehearing and rehearing *en banc* in the Fourth Circuit were denied accordingly, Judge Luttig of that Court, who had not participated in the panel decision, chose to issue an opinion with respect to denial of the petition for rehearing *en banc*, in light of his view that the important constitutional issues addressed by the original panel decision were wrongly decided. *See Harvey v. Horan*, 285 F.3d 298, 304 (4th Cir. 2002) (Luttig, J., respecting the denial of rehearing *en banc*):

> I believe that both the threshold procedural question of whether appellee asserts a cause of action under 42 U.S.C. § 1983 and the fundamental constitutional question of whether there exists under the Constitution of the United States a right, post-conviction, to access previously produced forensic evidence for the purpose of further DNA testing are important questions of law . . . [a]nd . . . that each question was decided incorrectly by the panel[.] . . . [¶] So believing, and having no other opportunity to express my views on these important questions — the panel opinion now constituting the law of our Circuit — I set forth those views herein.

Based on this premise, Judge Luttig explained his unequivocal disagreement with the *Harvey* panel's "functional equivalence" analysis, stating cogently as follows:

> I do not believe that the assertion of a constitutional right of access to evidence post-conviction even arguably implies, let alone "necessarily implies," the invalidity of the petitioner's conviction or sentence, as it must in order to be foreclosed under *Heck v. Humphrey*.
>
> * * *
>
> As to the threshold procedural question, I do not believe it even arguable that a post-conviction action merely to permit access to evidence for the purpose of STR DNA testing "necessarily implies" invalidity of the underlying conviction. Indeed, such *necessarily* implies nothing at all about the plaintiff's conviction. It certainly implies nothing more (and arguably it implies a good deal less) than does an assertion of constitutional right to material and exculpatory information producible under *Brady v. Maryland*, 373 U.S. 83 (1963), which has never been thought necessarily to imply the invalidity of the underlying conviction. The results of any DNA tests that are eventually performed may be inconclusive, they may be insufficiently exculpatory, or they may even be inculpatory. That these scientific possibilities exist, in and of itself, suffices to establish that the asserted right of mere access is not a direct, or for that matter even an indirect, attack on one's conviction or sentence. But if this were not enough

to establish the point, then it should be that, in order to overturn a conviction based on exculpatory evidence that might appear from any DNA testing, the petitioner would have to initiate an entirely separate action at some future date, *in which he would have to argue for his release upon the basis of a separate constitutional violation altogether.*

In sum, on no understanding would a plaintiff's action for mere access to evidence, "even if successful," "demonstrate the invalidity of any outstanding criminal judgment." *Heck*, 512 U.S. at 487. Therefore, on the direct authority of *Heck*, which properly was actually a quite narrow decision, "the action should be allowed to proceed in the absence of some other bar to the suit." *Id.*

Such an assertion of a right only to access is, in principle, wholly unlike the claims asserted in *Heck* for an assertedly illegal investigation and arrest. Those claims, the Supreme Court reasoned, were most analogous to the common-law cause of action for malicious prosecution, *id.* at 484, which required the plaintiff-accused to allege and prove the termination of the prior criminal proceeding in his favor. *Id.* Indeed, the almost polar difference between the claims in *Heck* for "actions whose unlawfulness would render a conviction or sentence invalid," *id.* at 486, and the claim of right merely to access evidence for the purpose of further tests, the results of which may even prove the defendant's *guilt* beyond any question, is virtual confirmation that the latter is

> not a challenge to one's conviction or sentence, but, rather, an assertion of an independent constitutional right.

285 F.3d at 307-08 (Luttig, J., respecting the denial of rehearing *en banc*) (emphasis in original).[2]

While Judge Luttig's analysis is not a decision and lacks the force of law, it nevertheless clearly signals that of the four members of the Fourth Circuit to directly address the precise "functional equivalency" issue that is presented by the instant case, two of them — Circuit Judges King and Luttig — are plainly of the view that a post-conviction Section 1983 action seeking the compelled production of evidence for DNA testing is *not* the "functional equivalent" of a collateral attack on the prisoner's conviction or sentence solely cognizable under the federal habeas corpus statutes and rules. The vitality and continuing viability of the panel's decision in the *Harvey* case as the governing law of the Fourth Circuit, considered in light of Judge Luttig's compelling analysis, is, at a minimum, in doubt. Since the decision of the Fifth Circuit in the other "conflicting" case cited by petitioners — *Kutzner v. Montgomery County*, 303 F.3d 399 (5th Cir. 2002) — essentially adopts the original panel decision in *Harvey* at face value, without critical scrutiny or independent analysis (*see Kutzner*, 303 F.3d at 341), that case is an equally dubious basis for finding the type of genuine, meaningful conflict in the circuits that has often served as the linchpin for this Court's granting of a writ of certiorari.

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2. *See also* Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. Pa. L. Rev. 547, 614-16 (2002).

Petitioner's complete failure to even acknowledge, much less deal with, the subsequent developments casting into uncertainty the continuing vitality of the *Harvey* panel decision as precedent on the "functional equivalence" issue should not mislead this Court. No "conflict in the circuits" worthy of this Court's discretionary expenditure of its scarce and valuable time and resources is presented by the tension between the coherent decision of the court below and the rulings in *Harvey* and *Kutzner*, the continuing force of which are doubtful, to say the least.

II. THE DECISION BELOW FAITHFULLY ADHERES TO THE REASONING AND RESULT ARTICULATED BY THIS COURT IN *HECK v. HUMPHREY* AND ITS PROGENY

The court below determined, based on straightforward application of the standard set forth by this Court in its decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), that respondent Bradley's Section 1983 action is *not* the "functional equivalent" of a petition for habeas corpus (which respondent is no longer entitled to bring, having previously litigated such a petition unsuccessfully, *see* 28 U.S.C. § 2244(b) (*quoted*, Pet. at 2)). The Court of Appeals so held because even if respondent achieves the complete relief he seeks — *i.e.*, production of the evidence sought for DNA testing, or an accounting by the State as to its inability to produce such evidence — both his conviction and death sentence will remain wholly unaffected. *Bradley v. Pryor*, 305 F.3d 1287, 1290 (11th Cir. 2002) (Pet. App. at 5-6).[3]

3. The decision below fully concurred, in so holding, with the coherent reasoning articulated by Judge King of the Fourth Circuit in his opinion concurring in the result reached by original panel in (Cont'd)

Petitioners insist that the court below erred, because "the obvious fact [is] that [respondent] Bradley seeks evidence from the State to attack the validity of his conviction and sentence. The evidence has no other conceivable value to him. The federal habeas corpus statute, including its rules governing discovery, is the proper avenue for [respondent] to obtain such relief." Pet. at 16. It is petitioners, not the court below, whose position is in error. Nowhere in this Court's decision in *Heck* can support be found for petitioner's suggestion that it is the claimant's ultimate *subjective intent*, rather than the objective nature of the relief sought by his or her Section 1983 claim, that is determinative with respect to the "functional equivalency" analysis. Thus, as Judge King observed in his concurring opinion in *Harvey*,

> [a] prisoner's underlying rationale . . . for bringing his § 1983 suit is not relevant under *Heck*. The applicable standard is an objective one, and the only relevant question is whether the prisoner's legal proceeding, if successful, would *necessarily imply* the invalidity of his conviction or sentence. *Heck*, 512 U.S. at 487 (emphasis added).

278 F.3d at 383.

The correctness of Judge King's analysis is illuminated by brief consideration of *Heck* itself. That case, as this Court observed, lay

> at the intersection of the two most fertile sources of federal-court prisoner litigation — the Civil Rights

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(Cont'd)
Harvey v. Horan, as well as with Judge Luttig's opinion regarding the denial of rehearing *en banc* in *Harvey*, both of which are quoted hereinabove. *See Bradley*, 305 F.3d at 1290-91; Pet. App. at 6-8; *compare supra* at 5-10.

> Act of 1871, Rev. Stat. § 1979, as amended, 42 U.S.C. § 1983, and the federal habeas corpus statute, 28 U.S.C. § 2254. . . . *Preiser v. Rodriquez*, 411 U.S. 475 (1973), considered the potential overlap between these two provisions, and held that *habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release*, even though such a claim may come within the literal terms of § 1983. *Id.* at 488-490.

Heck, 512 U.S. at 480-81 (emphasis added).

In *Heck*, the Court was called upon to apply the principles articulated in *Preiser* and its progeny to the situation presented by the claim of an Indiana state prisoner who, during the pendency of his direct appeal in the state courts from his conviction for voluntary manslaughter, initiated a Section 1983 action in federal district court, purporting to seek compensatory and punitive damages from certain local and state law enforcement officials who allegedly conducted an unlawful investigation resulting in the plaintiff's arrest, knowingly destroyed evidence which would have proved plaintiff's innocence, and caused an unlawful voice identification procedure to be utilized against plaintiff at his criminal trial. Plaintiff did not seek release from custody as an element of the relief requested in the Section 1983 action. 512 U.S. at 478-79. The district court dismissed the action, holding that the claims asserted "'directly implicate[d] the legality of [plaintiff's] confinement,'" *id.* at 479 (citation omitted in original), and the Seventh Circuit affirmed. In the interim, the Indiana Supreme Court upheld plaintiff's underlying conviction and sentence. *Id.*

Upon review of the lower courts' dismissal decisions, this Court affirmed. Distinguishing Heck's claims from the types of damages claims under Section 1983 that the Court had hypothesized in *dictum* in *Preiser*, and subsequently allowed to proceed in *Wolff v. McDonnell*, 418 U.S. 539 (1974), it held that Heck's claims could not be sustained under Section 1983, because a favorable determination of his claims would *necessarily* undermine the legal basis for his criminal conviction.

> We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983. *Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment*

> *against the plaintiff, the actions should be allowed to proceed*, in the absence of some other bar to the suit.

Heck, 512 U.S. at 486-87 (emphasis added and in original; footnotes omitted).

Thus, the fundamental principle established by *Heck v. Humphrey* is that a state prisoner's action that either directly challenges the validity of his conviction or sentence, or otherwise "necessarily implies" that his conviction or sentence was invalid, will not lie under Section 1983 unless the underlying conviction or sentence has already been struck down. Such actions may be pursued, if at all, only through a habeas corpus proceeding. *See also Edwards v. Balisok*, 520 U.S. 64, 646-48 (1997) (rejecting viability of state prisoner's claims for damages based upon constitutional challenge to procedures utilized by prison officials in conducting administrative hearing resulting in deprivation of prisoner's "good time" credits where, even though prisoner was not seeking reinstatement of lost credits, if allegations made against officials were true, the "necessary implication" was that deprivation of credits was unlawful). By contrast, where a state prisoner's claim asserted pursuant to Section 1983, if meritorious, would *not*, in and of itself, "necessarily imply" the invalidity of the claimant's conviction or sentence, it is expressly permissible under *Heck*. *See Edwards*, 520 U.S. at 648-49 (aspect of prisoner's amended complaint that sought injunctive relief requiring prison officials to adopt and maintain different standards in administrative hearings on a prospective basis "may properly be brought under Section 1983").

Considered in light of these principles, the correctness of the conclusion reached by the court below that respondent Bradley's action seeking only the production of evidence does not "necessarily imply" that he was invalidly convicted or sentenced is readily apparent. The misguided nature of petitioners' effort to focus attention on respondent's subjective intent finds no support in *Heck*, and is illuminated by *Edwards v. Balisok*, in which, notwithstanding the plaintiff prisoner's *express disclaimer* of any intent to obtain restoration of the "good time" credits he asserted had been revoked by the defendant prison officials in an unconstitutional manner, thus giving rise to his Section 1983 claims for damages, this Court nevertheless held that the action could not lie under Section 1983 because if the claimant's allegations were confirmed, the "necessary implication" of such findings would be that the deprivation of the "good time" credits he suffered was wrongful, thus mandating their restoration (and, accordingly, shortening the plaintiff's time of confinement). *See* 520 U.S. at 647-48.

Taken together, *Heck* and *Edwards* establish that the objective character of the relief sought, not the claimant's subjective motivation, determines the viability of a post-conviction prisoner's action under Section 1983. Under these governing authorities, the court below properly held that respondent's action, in which "[h]e prevails . . . once he has access to [the] evidence or an accounting for its absence," is the type of Section 1983 action that *Heck* "explicitly authorizes". *Bradley v. Pryor*, 305 F.3d at 1290-91; Pet. App. 5, 8. Petitioners' conclusory assertion that the court below "ignored the reasoning" of *Heck* — a contention petitioners barely even attempt to support with analysis — is clearly incorrect.

III. THERE IS NO "COMPELLING REASON" FOR THIS COURT TO UNDERTAKE *DE NOVO* CONSIDERATION OF AN UNDERLYING FEDERAL CONSTITUTIONAL QUESTION THAT WAS NOT DECIDED BY EITHER OF THE COURTS BELOW

Apart from the "functional equivalence" issue addressed above, petitioners also seek this Court's grant of a writ of certiorari to address and determine, *de novo*, the question of whether respondent's Section 1983 claim is supported by a valid underlying substantive due process right of post-conviction access to potentially-exculpatory evidence.[4] This issue was not reached by the district court in the proceedings below and, although the Court of Appeals panel required the filing of and presumably considered post-argument supplemental briefs from the parties, it also declined to decide the point.[5]

4. Although petitioners purport to frame the question as whether respondent has *either* a valid procedural *or* substantive due process right in this context, they concede that a procedural due process right exists, but contend that respondent failed to avail himself of the adequate procedures afforded by the Alabama state courts. Pet. at 19-20.

5. In his separate opinion specifically concurring in the decision below, Judge Birch stated in this regard, in pertinent part, that

> before a final conclusion should be reached on [the] unsettled issue [of whether or not respondent has a predicate procedural or substantive due process right to the relief sought], a substantially greater amount of thought and briefing should be pursued; just what rights, if any, does a convicted petitioner, who has exhausted

(Cont'd)

Although petitioners assert in conclusory terms that "the due process issue . . . is an important one that is cropping up in a number of cases throughout the nation," Pet. at 18, they offer no "compelling reasons" — as contemplated by Rule 10 of this Court's Rules — for this Court to depart from its settled practice of declining to accept for review or to rule upon issues that have not been decided by the courts below. *See generally National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999); *United States v. Bestfoods*, 524 U.S. 51, 72-73 (1998); *Holly Farms Corp. v. N.L.R.B.*, 517 U.S. 392, 400 n.7 (1996), *citing Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996) ("We generally do not address arguments that were not the basis for the decision below." (Citation omitted.)).

This case does not involve any special exigencies or extraordinary circumstances justifying a departure from this Court's normal refusal to decide issues *de novo*. Indeed, the court below may well have perceived — given the persistence of petitioners' heretofore steadfast, albeit uncorroborated, assertion that the evidence sought by respondent has been lost and therefore cannot be produced[6] — that there may be no need to reach or decide the complex substantive due process issue raised by petitioners if, in the proceedings on remand, the district

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(Cont'd)

> his direct appeals and post conviction avenues of relief, enjoy relative to discovery and testing of DNA evidence? Perhaps on remand, this issue will receive the added scrutiny it deserves.

305 F.3d at 1292; Pet App. at 11.

6. *See generally Bradley v. Pryor*, 305 F.3d at 1289 & n.1; Pet. App. 3 & n.1 (noting State's claim "that both the 'rape kit' and the victim's clothing are missing").

court determines after appropriate discovery that the evidence is, as a matter of fact, no longer available. That outcome would, in the absence of any further issue implicated by evidence of intentional destruction of the evidence,[7] resolve this matter on an alternative ground that obviates the need for adjudication of the constitutional question, in accordance with this Court's oft-stated preference. *See, e.g., Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring) ("The Court will not 'anticipate a question of constitutional law in advance of the necessity of deciding it. It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to the decision of the case.'" (Citations omitted.)); *accord Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549, 570 n.34 (1947) ("'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.'" (Citation omitted.)).

For these reasons, petitioners' invitation to this Court to reach out and grasp, for immediate review and determination, an issue which neither of the lower courts decided in this case and which *none* of the federal appellate courts have addressed, except in *dictum* contained in the original panel decision in *Harvey v. Horan*,[8] is without persuasive force or practical appeal, and should be rejected.

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7. *Cf. Arizona v. Youngblood*, 488 U.S. 51 (1988).

8. *See Harvey*, 278 F.3d at 377; *see also* 285 F.3d at 300-01 (Wilkinson, Ch.J., concurring in the denial of rehearing and rehearing *en banc*), *but see id.* at 310-26 (Luttig, J., respecting the denial of rehearing *en banc*) (explaining basis for finding that substantive due process right of post-conviction access to potentially-exculpatory evidence exists).

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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